LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 14 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 649

JOHN DWAIN DUGGER,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

KENNETH K. SIMON
and
LEWIS E. PIERCE
ROBERT G. DUNCAN
PIERCE AND DUNCAN
1207 Grand Avenue
Kansas City, Missouri 64106
Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

Table of Cases Cited I

Table of Statutes, Rules and Constitutional Provisions Cited I

Petition for Writ of Certiorari to the United States Court of Appeals for The Eighth Circuit—

(a) Opinion Below 1

(b) Grounds for Jurisdiction 2

(c) Questions Presented for Review 2

(d) Constitutional Provisions, Statutes and Rules Involved 3

(e) Statement of the Case 5

(f) Argument 7

Appendix "A"—Opinion of The United States Court of Appeals for the Eighth Circuit A1

Table of Cases Cited

Brady v. *Maryland*, (1963) 373 U.S. 83 8

Table of Statutes, Rules and Constitutional Provisions Cited

Federal Rules of Criminal Procedure Rule 16, Title 18, United States Code 2, 3, 6, 7, 8

Fifth Amendment to the United States Constitution 3

Section 2312, Title 18, United States Code 2

Section 1254, Title 28, United States Code 2

Sixth Amendment to the United States Constitution 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

JOHN DWAIN DUGGER,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

John Dwain Dugger, by and through his attorneys of record, presents his Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, and states:

(a) Opinion Below

The opinion below is not yet officially or unofficially reported. A copy of that opinion is appended hereto.

(b) Grounds for Jurisdiction

Petitioner seeks to have reviewed an order of the United States Court of Appeals for the Eighth Circuit, dated June 18, 1968, in Cause No. 19 025, therein affirming a judgment of conviction and sentence by the United States District Court for the Western District of Arkansas. Petitioner's Motion for Rehearing or for Reconsideration by the Court of Appeals en Banc were denied on August 27, 1968. This petition is presented under the authority of Section 1254, Title 28, United States Code.

(c) Questions Presented for Review

The questions presented for review involve not only the sufficiency of the evidence to support a conviction (as will be hereinafter more fully set out under Argument herein) but also the applicability and extent of discovery and inspection required under *Federal Rules of Criminal Procedure, Rule 16(b), Title 18, United States Code.* Petitioner was charged and tried with Otto Lewis Meyer with nine counts of interstate transportation of stolen motor vehicles in violation of *Section 2312, Title 18, United States Code,* and one count of conspiracy to violate such statute. Prior to trial a search warrant was issued and the farm of said Otto Lewis Meyer was searched and numerous papers and other items were seized. Prior to trial, the defendants filed a Motion for Discovery and Inspection seeking, among other things, to inspect these items that were seized from one of the defendants. The trial court denied this motion in toto and the Court of Appeals affirmed that denial holding the trial court did not abuse its discretion.

(d) Constitutional Provisions, Statutes and Rules Involved

The constitutional provisions, statutes and rules involved are as follows:

Fifth Amendment to the United States Constitution:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to the United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . . ."

Federal Rules of Criminal Procedure, Rule 16, Title 18, United States Code:

* * *

"(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective govern-

ment witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C., § 3500.

* * *

(d) Time, Place and Manner of Discovery and Inspection. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(e) Protective Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court enters an order granting relief following a showing in camera, the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

* * *

(g) Continuing Duty to Disclose; Failure to Comply. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing

in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances. As amended February 28, 1966, eff. July 1, 1966."

(e) Statement of the Case

Petitioner, Otto Lewis Meyer and a defendant that was acquitted during the trial, were indicted in a ten count indictment charging the transportation in interstate commerce of stolen motor vehicles and the conspiracy to do so. The gist of the indictment was that the defendants were securing titles to automobiles upon automobiles they either already owned or by the use of forged bills of sale, and that they would then alter the serial numbers on stolen automobiles so as to conform to those titles. They were alleged then to have transported at least ten such motor vehicles from Missouri to Arkansas where they sold them to used car dealers. The government offered seventy-nine (79) documentary exhibits and twenty-three (23) witnesses during the trial, none of which was the Petitioner allowed to examine prior to trial.

In order to establish its case, the government attempted to introduce evidence to trace to the petitioner and his co-defendant the forged title applications and bills of sale, the fraudulent title certificates, and the automobiles that were later recovered. Petitioner submits there was no proof that the automobiles recovered by the F.B.I. were the same automobiles that the defendants transported to Arkansas. As found by the Court of Appeals, the recovered automobiles may have been identified as the stolen automobiles, but there was no evidence identifying these as being the motor vehicles that the defendants transported. A complete reading of the transcript will be necessary to fully explore this lack of evidence.

Prior to trial, the government, under authority of a search warrant, seized from the farm of petitioner's co-

defendant, Otto Lewis Meyer, a box and two sacks of papers which included checks, bank records and retail automobile orders. The evidence tended to establish that petitioner was employed by Meyer and that Meyer secured the fraudulent automobile titles. Defendant Meyer testified that the records seized from his farm were essential to his defense (Tr. 265, 269, 282) and offered no documentary evidence during the trial. The F.B.I. agents testified the papers they seized were of no value to the defense and were not relevant to the transactions charged (Tr. 316-317), but the seized papers were never returned to Meyer.

Prior to trial, the defendants filed a Motion for Discovery and Inspection under *Federal Rules of Criminal Procedure Rule 16(b)* seeking to inspect the items and papers seized from Meyer's farm and all other books, papers, documents, and tangible objects within the possession, custody, or control of the government pertaining to the transactions in the indictment, including the title certificates and alleged fraudulent and forged title certificates. Defendants attached to that motion a copy of the search warrant and the return thereof. The government in its response to that motion, apparently relying upon *Rule 16*, prior to its amendment effective July 1, 1966, objected to the motion because it did not specify the items sought to be inspected. The motion was filed almost a year after that amendment. The trial court denied that motion as well as petitioner's Motion for Bill of Particulars.

The trial resulted in the conviction of petitioner and Otto Lewis Meyer and Petitioner was sentenced to a total of ten (10) years imprisonment. He duly appealed to the United States Court of Appeals for the Eighth Circuit and that Court affirmed holding the trial court did not abuse its discretion in denying petitioner's Motion for Discovery and Inspection.

(f) Argument

Federal Rules of Criminal Procedure Rule 16 was amended effective July 1, 1966, so as to liberalize the discovery available to a defendant in a federal criminal charge. The amended rule provides for discovery upon a showing of materiality to the preparation of the defense provided the request was reasonable. In our present case the petitioner did specifically set out what items he sought to inspect (those items seized from his co-defendant's farm and the alleged fraudulent title certificates). Certainly that was a reasonable request and certainly the title certificates were material for they were the very basis of the charge and were alleged in the indictment and were introduced in evidence by the government during the trial.

The materiality to the defense of all of the records of a co-defendant who was the alleged moving party is certainly obvious. Only the defendants can decide what of their documents can be of value to them in their defense, and the government agents should not be allowed to make that determination for the defense. The government here claimed the papers were of no value to the defense, yet it resisted all efforts by the defense to inspect those papers and refused to return them to the defense. If they were of no value, why weren't they returned? Why were they seized in the first place?

The trial court obviously accepted the government's statement that the seized documents were of no value to the defense, without even any in camera inspection so that it could make its own determination, as provided for in subparagraph (e) of *Rule 16*.

Petitioner also sought to inspect the alleged altered serial numbers (such alterations being alleged in the indictment). As to some the only evidence to such alteration was the testimony of an F.B.I. agent, unsupported by

any photograph or cast (Tr. 169), who testified he was able to see the restoration of the original serial number by the use of a chemical (Tr. 166). The defense, because of the trial court's denial of its motion, was deprived of any opportunity to question such restoration and petitioner was therefore convicted upon "I saw this say" evidence. The defense, and the jury never saw what the agent said he saw, and the defense was denied any opportunity whatsoever to use an expert witness of its own choosing to test this "restoration." It should also be pointed out that the government expert that made the actual restoration of the alleged original serial numbers did not testify during the trial, and thus petitioner was deprived of any opportunity to even cross-examine him.

Petitioner submits that it is no answer to his dilemma of going to trial without any opportunity to inspect the documentary evidence seized from the defense, and denied to the defense, and without any opportunity to examine the alleged altered serial numbers and fraudulent title certificates prior to trial, for the Court of Appeals to say that *Rule 16*, is discretionary and the trial court did not abuse its discretion in denying any discovery whatsoever. The Court of Appeals also said that there was no showing that any of the papers seized from Meyer would be of value to the defense. The defendant Meyer testified the government seized his records as to his lawful purchase of the automobiles in question (Tr. 265, 269, 282). With the papers in the possession of the government, it is impossible to see how the defense could establish their need otherwise. Again, if the papers were of no value to the defense, why did the government resist their return to the defense? Petitioner respectfully submits that the doctrine of *Brady* v. *Maryland*, (1963) 373 U.S. 83, prohibiting as a denial of due process the prosecution's failure to fur-

nish to the defense evidence favorable or helpful to the defense. Such a denial of due process is not rectified by a discretionary order of the trial court.

Petitioner respectfully suggests that the Court of Appeals, below decided a question of federal law which has not been, but should be, settled by this Court. In our present case, the petitioner sought to inspect items seized from his co-defendant and which his co-defendant testified would be necessary and material to the preparation of the defense. The Court of Appeals affirmed the trial court's denial of the petitioner's request to do so, upon the basis that such a request is discretionary and that that discretion was not abused where the government, which seized and continued to keep the papers, took the position that the papers were of no value to the defense.

Petitioner respectfully suggests that such a ruling so departs from the ideals of fundamental fairness that it is a denial of due process of law. Petitioner further respectfully suggests that this Court should review this cause and rule that a defendant has a constitutional right to inspect prior to trial any item seized from either himself or a co-defendant in order to make his own determination as to whether any such item may be of use to the defense, and if he determines that it is then holding that he may use in evidence any such item, if otherwise admissible.

Respectfully submitted,

KENNETH K. SIMON
LEWIS E. PIERCE
ROBERT G. DUNCAN
PIERCE AND DUNCAN
1207 Grand Avenue
Kansas City, Missouri
Counsel for Petitioner

APPENDIX "A"

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 19,024.

Otto Lewis Meyer,
Appellant.

v.

United States of America,
Appellee.

No. 19,025.

John Dwain Dugger,
Appellant.

v.

United States of America,
Appellee.

} Appeals from the United States District Court for the Western District of Arkansas.

[June 18, 1968.]

Before MATTHES, MEHAFFY and LAY, Circuit Judges.

MEHAFFY, Circuit Judge.

Otto Lewis Meyer and John Dwain Dugger were convicted under a ten-count indictment, nine of which counts

charged transportation of stolen motor vehicles in interstate commerce in violation of 18 U.S.C. § 2312, commonly called the Dyer Act, and one count charging conspiracy to accept and agree to accept motor vehicles stolen in various places in the United States outside the State of Arkansas for the purpose of transporting said vehicles into Arkansas for sale in violation of 18 U.S.C. §§ 2, 371 and 2312. Upon the jury's verdict of guilty on all ten counts, the court sentenced these defendants to a term of two years on each of the first five counts, said sentences to run consecutively, and a sentence of two years on Counts 6 through 10 to run concurrently with the sentences on the first five counts.

The assignments of error forming the basis for this appeal are the asserted insufficiency of the evidence to support the convictions and denial by the trial court of defendants' motion for discovery and inspection under Fed. R. Crim. P. 16 (b). We affirm the convictions.

Briefly summarized, the facts disclosed by the evidence reflect that Meyer operated two used car lots in Sedalia, Missouri, and resided on a farm approximately twenty miles southeast of Sedalia. Defendant Dugger originally was employed at the Owens Auto Sales in Independence, Missouri, and later moved to Arkansas and resided near Fayetteville where he was engaged in the business of wholesaling cars in northwest Arkansas. Defendants had become acquainted four or five years prior to the offenses here, and during the period of the alleged conspiracy and transportation of the automobiles involved had considerable business dealings with each other.

In connection with defendants' argument with reference to sufficiency of the evidence, they specifically assert that the deficiency in evidence consisted of failure to prove that the stolen automobiles listed in the indictment were the same automobiles which they allegedly possessed in Ar-

kansas. Defendants make no contention that the automobiles listed in the indictment were not stolen, but only claim that the Government has failed in its proof to show that the cars transported to Arkansas and sold by defendants were identified as the same cars that had been stolen.

Our examination of the record evidence indicates that the identity of the nine cars listed in the indictment was clearly established by the restoration of the true identification numbers by the FBI, which numbers had been ground off. A comparison of the restored numbers revealed that they were in fact the stolen automobiles. It so happened that only one of the nine cars was recovered by the owner, who testified as to the identity of his car. In addition to the identification numbers, he recognized a scratch on the glove compartment and found a magnetic hide-a-key box underneath the V-bar frame containing his extra car and house keys.

It would unduly extend this opinion to detail all of the evidence adduced on each of the counts, but, as an example, we relate the evidence in Count 6 which charged defendants with transporting or causing to be transported the automobile belonging to Harvey Holloway, and the evidence of the conspiracy charged in Count 1.

Holloway testified that he was the owner of a 1966 Chevrolet Impala two-door hardtop, giving the identification number as described in Count 6, and that he had compared the number with the number shown on his Missouri title which was introduced into evidence, and it was the same; that the automobile was willow green in color; was stolen from the Montgomery Ward parking lot in Kansas City, Missouri on August 8, 1966 and recovered in Fort Smith, Arkansas where it still had on it a magnetic hide-a-key box which contained his car and house keys as well as a key to a house he owned on the Lake of the Ozarks. As further

identification, he identified the car by a scratch on the door of the glove compartment caused by a turning of the key.

On the day following the theft of the car, it was transported to Fort Smith, Arkansas by defendant Meyer's son, who testified that defendant Dugger gave him $25.00 to drive it from Sedalia to Fort Smith and bought him a bus ticket back home. On that same day, Dugger drove another car to Fort Smith and traded both cars to the Farmer Auto Sales for a third car and the cash difference. The purchaser stated that he had met defendant Dugger about 1962, and had seen him from time to time since then at automobile auctions. Farmer received from Dugger a Missouri title in the name of Meyer Auto Sales, endorsed by Otto Meyer, for each of the two cars and wrote the serial numbers shown on the titles on his check, one of said numbers being later determined by the FBI to be an altered number on the car belonging to Mr. Holloway.

Mrs. Mae Walker, owner of a title service company in Jefferson City, Missouri, which she operates as a service to automobile dealers to expedite procurement of titles, testified that on June 28, 1966 she received an application from Meyer Auto Sales signed by Otto Meyer for a title for a 1966 Chevrolet two-door Impala hardtop along with a supporting document purporting to be a Kansas bill of sale from the Van T. Chevrolet Company in Topeka, Kansas, showing the altered identification number of the car described in Count 6 of the indictment. This instrument was purportedly executed by Lee Lefever as Sales Manager and notarized by Frank K. Goldfuss, but both men testified that their purported signatures were forgeries. Mrs. Walker obtained the title as requested and mailed it back to defendant Meyer.

A field representative with the Motor Vehicle Division of the Missouri Department of Revenues made a photostat

of the microfilm records of which he was the official custodian and identified the photostat of the bill of sale and application for title which Meyer Auto Sales filed with the Department to obtain the title for the Chevrolet involved.

A special agent for the FBI testified that his official work in connection with the cars involved was to examine the vehicles and observe the true numbers after they had been restored. He made this examination on the Chevrolet involved in Fort Smith. After the removal of the plate on which the altered public identification number appeared, he assisted men from the FBI laboratory and they were able, by means of using certain chemicals, to restore a number that apparently had been ground off. This technique utilized a liquid compound which, when hardened, was removed, the cast thus made bearing an impression of the true identification number. A fingerprint powder lift was made which also showed the true identification number of the automobile to be the number of the Chevrolet involved.

Such identification of an automobile by its true identification number, as was done here, is positive proof of its identity and no additional evidence is required. *United States* v. *Wheeler*, 219 F.2d 773 (7th Cir. 1955).

Defendants objected to use of photostats of the bill of sale, application for title, etc., but this type of evidence is clearly permissible under 28 U.S.C. § 1732. See *Thompson* v. *United States*, 334 F.2d 207 (5th Cir. 1964).

Proof of the identity of a stolen automobile as one transported to another state by a defendant in a Dyer Act case by a comparison of the identification number is not required, however, when it can be identified by other means of proof. *Welch* v. *United States*, 360 F.2d 164, 165 (10th Cir. 1966); *Massey* v. *United States*, 358 F.2d 782, 786 (10th Cir. 1966).

It is thus seen that Holloway's car was sufficiently identified by either the true identification number or by the scratch on the glove compartment and the magnetic hide-a-key box. The cases cited by defendants to establish that the identity of the cars was not made are factually inapposite as they neither contain proof by identification number nor other identifying features peculiar to a particular automobile.

We have carefully considered the evidence adduced in connection with the other counts and are thoroughly convinced that the evidence presented in each count was sufficient to establish the identity of the automobiles which defendants transported or caused to be transported into Arkansas, and that it was sufficient in all respects to sustain the convictions.

Additional to the foregoing, there is an abundance of proof of conspiracy. Defendants made false statements and misrepresentations to Farmer and others concerning various cars. Although Meyer denied at the trial that Dugger worked for him, Cecil Farmer of Farmer Auto Sales testified that when he bought a 1965 Cadillac from Dugger on an open title from Meyer Auto sales Mr. Meyer told him on the telephone to make the check payable to defendant Dugger—that he had him "under a heavy bond, and he is a good boy, and said just go ahead and make it payable to him." On another occasion, defendant Dugger asked Mr. Farmer to verify to a Fort Smith bank that he worked for defendant Meyer so that he could cash a check which Farmer had made payable to Meyer Auto Sales, since Dugger had given Farmer an open title on the car from the Meyer company, and Dugger endorsed the check as manager of the Meyer company. Both Meyer and Dugger represented the 1965 Cadillac sold to Farmer Auto Sales as a car which Meyer had bought new from Knipp Motor Company in Jefferson City, Missouri. Farmer called Knipp

and verified the fact that Meyer had bought a 1965 Cadillac bearing that number from Knipp, but it later developed that the car sold to Farmer was the stolen automobile described in Count 3, and the public identification number had been changed to the same number as the car Meyer purchased. Defendants gave Farmer a duplicate title and no warranty book, stating that Meyer lost the original title on it. Mrs. Walker testified that she procured a duplicate title for Mr. Meyer upon his representation that he had lost the original.

Farmer also bought a 1966 Cadillac from Dugger which Meyer purportedly bought new. He received an original title on the 1966 Cadillac, but it was later discovered to be the stolen automobile described in Count 4. A duplicate title on this car was obtained by Meyer and used to sell the 1966 Cadillac which he actually purchased.

The proof that the numbers on the stolen Cadillacs had been altered to fit the numbers on the cars which defendant Meyer had bought new and that duplicate titles had been obtained for use in disposing of the cars indicated a plan or conspiracy for Meyer to buy one Cadillac new, obtain a duplicate title for it, and then use the two titles to sell the car he purchased and a car of the same make, model and body style which had been stolen and the numbers altered to fit the title. Also, there was evidence of a conspiracy by defendants to alter the true identification numbers on the cars described in the other counts, and to represent some of them as cars which were damaged by a tornado in Topeka, Kansas and rebuilt.

All of the related evidence, and much more, amply suffice to justify a jury in finding a criminal conspiracy and we, as a reviewing court, must view the evidence most favorably to sustain the jury's verdict. *Love* v. *United States*, 386 F.2d 260, 264 (8th Cir. 1967); *Lee* v.

United States, 363 F.2d 469, 475 (8th Cir. 1966); *Canaday* v. *United States,* 354 F.2d 849 (8th Cir. 1966); *Babb* v. *United States,* 351 F.2d 863, 866 (8th Cir. 1965); *Jaben* v. *United States,* 349 F.2d 913 (8th Cir. 1965).

The only other assignment of error relates to the trial court's refusal to grant defendants' motion for discovery and inspection of certain records under Fed. R. Crim. P. 16 (b). The learned trial court held that the motion was clearly insufficient. In any event, under the rule the production of such records is discretionary with the trial court, and there was no abuse of discretion here. The defendants urge that the books and records seized by the Government at Meyer's garage were necessary in the preparation of their defense, but we are not persuaded. A Government witness who executed the search warrant testified that he did not seize, or even find, ledgers or records of that sort. While the Government did seize some bank statements, Meyer himself testified that he always paid cash for cars, so it is difficult to see how his cancelled checks would have been of any value to him. Neither was it shown that there were any other papers seized which would have been beneficial in the preparation of the defense.

While the Government was under no legal compulsion to furnish the records in its possession, yet under a motion for bill of particulars it did in response furnish defendants a work sheet prepared by the FBI containing information concerning thirty-nine automobiles alleged to have been transported by defendants, identifying the automobiles on the work sheet which corresponded to the cars in each count of the indictment by the chronological number on the list. This work sheet information included a description of each car, the public identification number, the true identification number, the title number, the date

issued, the date and place stolen, the name of the person or company to whom it was sold, the date it was sold, the name and address of the person or company to whom it was resold and the name and address of the person or company in whose possession it was located. This information amply sufficed to permit defendants to adequately prepare for trial and consequently no prejudice could possibly have resulted to defendants by the court's refusal to grant their motion, which, as we have already noted, was discretionary.

The judgments of conviction are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.